IN THE

Supreme Court of the United States

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

REPLY BRIEF IN SUPPORT OF PETITION

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OCTOBER TERM, 1963

No. 1007

BROTHERHOOD OF LOCOMOTIVE ENGINEERS, *Petitioner*,

v.

CERTAIN CARRIERS REPRESENTED BY THE EASTERN, WESTERN, AND SOUTHEASTERN CARRIERS' CONFERENCE COMMITTEES, UNION PACIFIC RAILROAD, ET AL., *Respondents*.

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1. Respondents do not challenge that the award on the key issue (which runs and which assignments locomotive engineers would be required to work without engine service assistants, commonly referred to as "firemen") did not derive any aid from any statutory policy or standards (Pet. 26); that it departed com-

pletely and without restraint from the pattern of interests which had been emerging from the history of bargaining and mediation (Pet. 29); that it rendered nugatory the manifest intent of the statute to preserve, prefer, and utilize the results of collective bargaining (Pet. 36); that, in providing a completely new solution for this key issue, it failed to make use of any mediation results of the Secretary of Labor (Pet. 37). To the contrary, carrier respondents and the courts below rely on the supposed absence of agreements on this key issue to justify a "start from scratch," a solution of the board's own invention (Pet. 18).

2. The respondent carriers did not challenge or answer the point that the board unconstitutionally redelegated statutory responsibility and deprived petitioner and employees represented by petitioner of their rights without due process of law (Pet. 30-32).

3. Concerning the matter of alleged concessions as to procedural due process, the sense of the stipulation as partially quoted in carrier respondents' brief (p. 4) is distorted. The stipulation expressly excepted matters on which objections had been raised during the course of the hearings; further it related to the oral hearings only and not to the subsequent steps and omitted steps (e.g., failure to provide for closing arguments or briefs, failure to provide for opportunity to inspect and comment on proposed findings and a proposed order); finally, at the time it was made the stipulation did not and could not contemplate that the end results would be improvised and would not flow from the matters covered by the hearings, insofar as the key issue is concerned (which runs and which assignments locomotive engineers would be required to work without engine service assistants).

4. Concerning the matter of alleged concession as to the inapplicability of 28 U.S.C. §2282, it was and remains petitioner's view that the question is entirely jurisdictional and that the district court should have required no motion to do what it was obligated to do *sua sponte* (see R. 668).

5. Concerning the proposed melding of the carrier members' opinion and of the neutral members' opinion for the purpose of synthesizing a majority opinion, examination of the two statements of opinion fails to substantiate that there was in fact agreement by a majority of the board on findings. Further, each separate statement of opinion fails to include subsidiary findings of fact made on the record before the board.

6. Reference is made to the briefs in opposition to the petition for a writ of certiorari in No. 935, in which it was alleged that there were negotiations looking toward the submission of the matters in dispute to voluntary arbitration. The implication appears to be intended that the compulsory arbitration was merely carrying out the basic intent of the parties. The facts are that no agreement for voluntary arbitration was ever concluded; that nothing came before the board from the Secretary of Labor or from any other source concerning such an agreement; that there is nothing in the record of this case that shows or can show that petitioner ever contemplated an agreement that would provide unfettered discretion to any third party to resolve matters in dispute; that, to the contrary, petitioner offered to prove in the courts below that its offer to engage in voluntary arbitration was conditioned on stipulations preserving the gains achieved in collective bargaining and mediation, and contemplated a predetermined result known in advance by the par-

ties (R. 656-658). In any event, the matter of voluntary arbitration was disputed in the courts below and could not have been decided on cross-motions for summary judgment (JA 27111, 276-277, 299-300). The opinions below did not rely at all on any supposed meeting of the minds on voluntary arbitration.

7. The reliance by the respondents (Car. Br., p. 5, n. 3; U.S. Br. No. 935, p. 21, n. 28) upon *Switchmen's Union of North America* v. *National Mediation Board*, 320 U.S. 297 (1943) and *Union Pacific R. Co.* v. *Price*, 360 U.S. 601, 615-616 (1959) for the view that neither judicial review nor findings of fact are constitutionally required, is misplaced. Those cases did not, as here, involve a situation in which, without judicial review or findings, the court would be entering a judgment which would amount to nothing more than a rubber stamp of an award. Where a court is being asked to embody the decision of another body in the form of a judicial decree as required by Public Law 88-108 and Section 9, Fifth of the Railway Labor Act, the Constitution imposes the requirement that the court itself determine that its judgment is based on fair proceedings and rational results. Compare *Shelley* v. *Kraemer*, 334 U.S. 1 (1948). The court cannot determine whether there were fair proceedings or rational results unless there are findings of fact made upon the record which it can review. See cases cited Pet. 34.

8. The Government's motion in opposition, page 2, equates the position of the petitioner to the rejection of separate craft bargaining. This is a misreading of the situation. The petitioner has been duly certified to bargain about the working conditions of the craft of locomotive engineers on most of the railroads in this case. It is rendered impotent to discharge its respon-

sibility in that the award without basis, without explanation, and in the face of the history of the dispute and the unchallenged evidence before the board that the locomotive engineers' safety and burden of work are most at stake, completely ousts petitioner from collective bargaining over vital working conditions of the locomotive engineers for a period of years. This is a deprivation of rights without due process of law.

9. The carrier respondents refer to the fact that the statutes whose validity and construction are questioned in this case apply only to a particular dispute. Immediately affected are 200,000 operating employees. Put at hazard is our system of free collective bargaining. The statute involved is an example of policy making and legislation by *ad hoc* boards. In the future, this example, if sustained, would be an attractive invitation to deadlock collective bargaining for the purpose of securing compulsory arbitration.

CONCLUSION

For the reasons set forth above and in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

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